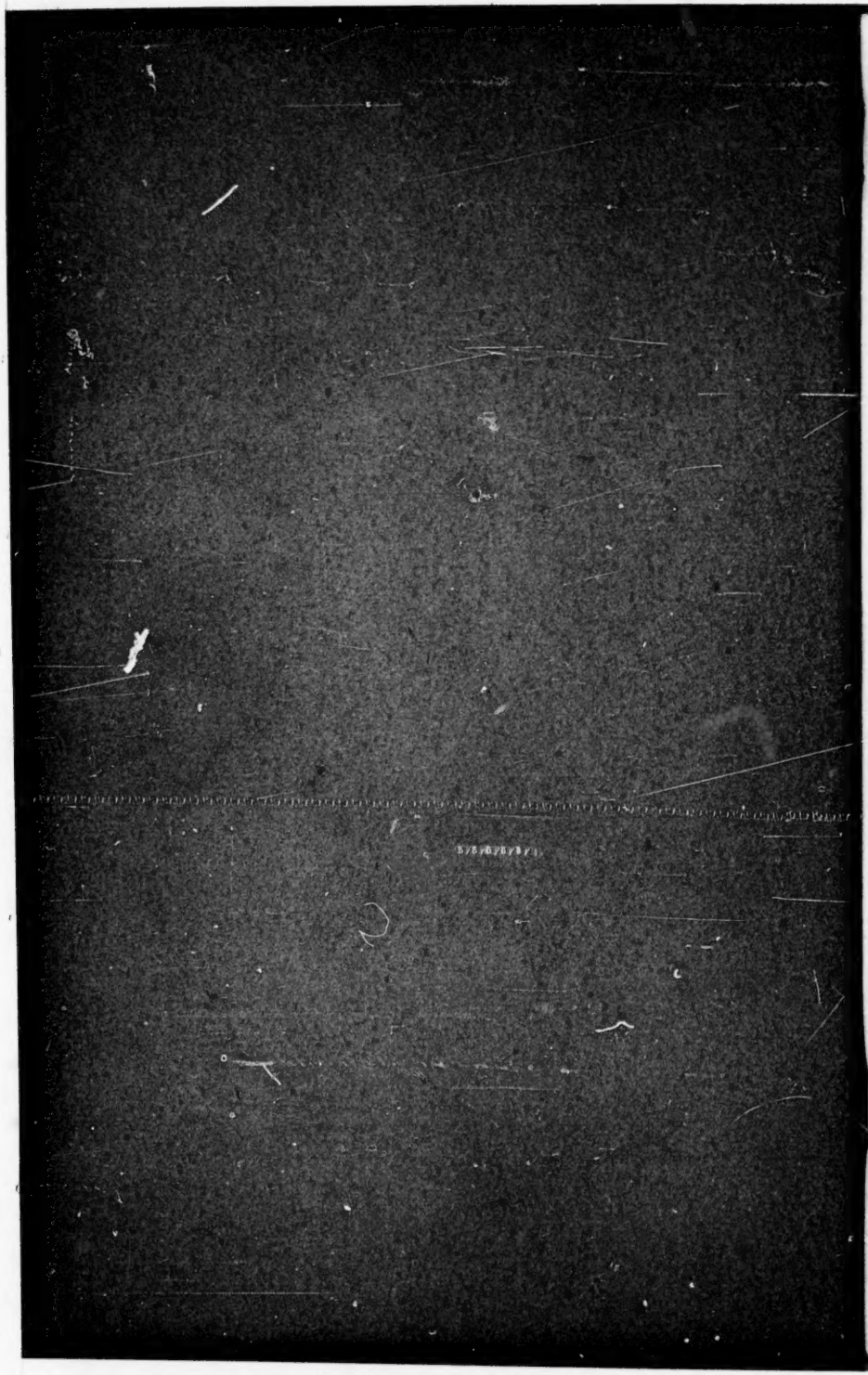

SUPREME COURT, U. S.

AUG 16 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-2052

W. KENNETH POPE, ET UX,
Petitioners

v.

THE STATE OF TEXAS, ET AL,
Respondents

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondents, State of Texas, and the County of Harris, Texas, pray that Petitioners' application for Writ of Certiorari be denied. To demonstrate that Certiorari should be denied, Respondents would show the following:

STATEMENT OF THE CASE

In this case the State of Texas and the County of Harris, Texas, exercised their power of eminent domain to acquire 4.2122 acres of Petitioners' land. The land was condemned for highway purposes.

DELAY BETWEEN FILING AND TRIAL OF THE CASE

The proceeding was initiated on January 13, 1959, (Appendix p. 19) but the case did not come to trial until March 20, 1972, (Appendix p. 26). This long delay is primarily the fault of Petitioners, first, because it was Petitioners who contested the preliminary or administrative award by Special Commissioners (Appendix p. 23) and second, because Petitioners withdrew this preliminary award on May 10, 1959, (Appendix p. 30). Under applicable State law this withdrawal of money—advanced as compensation for the land—operated to eliminate all issues in the case other than the issue of value, i.e., the issue of how much compensation Petitioners should ultimately be paid. *State v. Jackson,* Tex. Sup. 388 S.W.2d 942 (1965). Under applicable State law, the Petitioners therefore had the burden of proof *and the responsibility to go forward with their case. Denton County v. Brammer,* Tex. Sup. 361 S.W.2d 198 (1962).

Petitioners attempt to explain this long delay by an allegation of ". . . extended title litigation . . ." (Petition p. 5). Additionally, the opinion below alludes to ". . . protracted trial in a trespass to try title action. . . ."* (Petition P. A-5) However, the record that was before the State Court of Civil Appeals was, in fact, silent as to how long the question of title was in litigation. The Judgment of the Trial Court—in explaining the dismissal of an intervening claimant—describes the title litigation. (Appendix p. 28), but is silent as to its duration. The reference by the Court below, to a ". . . protracted trial in a trespass to try title action . . ." was induced by a statement of Petitioners in the course of oral argument.

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* Trespass to try title is the Texas form of action corresponding to the Common Law form of action of Ejectment.

In Respondents' Answer to Petitioners' Application for Writ of Error in the Supreme Court of Texas (Appendix p. 35), Respondents, by reference to a reported Appellate opinion in the title litigation, demonstrate that the title litigation in fact did not explain or justify the thirteen (13) year delay between the filing and the trial of this case.

CONSEQUENCE OF DELAY

The crux of Petitioners' complaint is that the State did not present that *opinion* evidence *most favorable to Petitioners.*

The record is undisputed that the Attorney for the Respondents sought to use the *opinion* testimony of Mr. Thomas Bearden, but found him "unavailable to testify." (Appendix p. 37). Petitioners complain that Bearden's testimony was "suppressed." At the motion for new trial, Respondents offered a full explanation as to why Mr. Bearden was "unavailable to testify," but Petitioners objected to the explanation as "hearsay" and the objection was sustained. (Appendix p. 38). Petitioners might then have subpoenaed Bearden to the motion for new trial to question him as to his "availability" to testify in 1972, but instead they elected to rest on the explanation—which due to their own objection—remained incomplete.

While Mr. Bearden was found to be "unavailable to testify" when Petitioners finally brought this matter to trial, he had testified before the Special Commissioners on January 30, 1959. (Appendix pp. 37-38). Petitioners cannot legitimately complain that they did not know of the Bearden appraisal, because in fact they did hear him testify at the Commisisoners' hearing, and in fact reveal considerable prior knowledge of Mr. Bearden's appraisal in their Amended Motion for New Trial (Petition p.

A-15). This motion was, of course, filed in advance of the hearing on motion for new trial, and reveals the extent to which Petitioners were knowledgeable about the Bearden appraisal prior to hearing on motion for new trial. Thus it may not be suggested that Petitioners first learned of the Bearden appraisal at the hearing on motion for new trial.

Under the then applicable State law,* Petitioners could have subpoenaed Bearden as a witness. *State v. Biggers,* Tex. Sup. 360 S.W.2d 516. Had they done so, they would have been precluded *initially* from revealing that Bearden had appraised the property for the State, however, under *State v. Biggers,* had Respondents' counsel in any way impeached Bearden, or attacked his credibility, then Petitioners would have been permitted to reveal that Bearden had appraised the property for the State.

Thus Petitioners were aware of the Bearden appraisal and could have produced Bearden's testimony—under subpoena—at their own election. The Bearden appraisal was not suppressed.

As Bearden did testify against Petitioners at the Special Commisisoners' hearing on January 30, 1959, it cannot be contested that Petitioners did know about his appraisal well before trial. Additionally, it is clear that Bearden was "available" to testify in 1959, and would, in all probability, have been "available" to testify for a reasonable time thereafter. As the undisputed evidence reveals that Respondents' counsel first sought to use Bearden as a value witness, and only used Finley on Bearden's representation that he was "unavailable to testify" (Ap-

* The State law has since been revised by revision of the State discovery procedure, Rules 167, 168 and 186a, Texas Rules of Civil Procedure.

pendix pp. 37-39), it is clear that it was Petitioners' own neglect and delay that caused the Respondents to be unable to use the evidence which Petitioners now claim to have been "suppressed."

THE "UNAVAILABILITY" OF BEARDEN

The Petitioners have challenged the question of Bearden's "availability" by arguing that the record reveals he was alive, in business and could have been subpoenaed. Thus, argue Petitioners, he was "available." As noted above, Petitioners too were fully aware of Bearden's appraisal, and they too could have subpoenaed him. The question of Bearden's "availability" by subpoena is not the issue. As noted, Respondents offered a full explanation as to why Bearden was "unavailable to testify," and such explanation was blocked by Petitioners' objection.

The point is that over thirteen years had elapsed since Bearden made the appraisal. He had been retained in 1958 to make an appraisal and to testify as an expert witness. He had—in 1959—testified as an expert witness at the Administrative, or Commissioners' hearing. Thus he had fulfilled his original obligation. While Petitioners by their objection suppressed the full explanation, it may be readily recognized that much can happen in thirteen years. The question is one of Bearden's "availability" thirteen years after doing his appraisal to serve *willingly* as an *expert witness*. For this purpose he was "unavailable," and evidence as to his "unavailability" remains undisputed. The Transcript of Testimony in the Trial Court exceeds 500 pages. Most of this testimony was the testimony of *only* two expert appraisers on direct and cross examination.

To properly prepare for such testimony, both sides obviously expended time in consultation with the wit-

nesses. The witnesses themselves each spent many hours in reviewing their files, studying exhibits and notes, and consulting with counsel in preparation to testify. Each testified extensively and each underwent grueling cross examination. In this context, Bearden—thirteen years after he had made his report and first testified—was not *willingly* "available" to serve as expert witness.

The question is whether or not Respondents' counsel committed a wrong in electing not to call an *unwilling* expert who could only be produced by *subpoena.* Since Bearden's only availability *was by subpoena,* the question arises, can Petitioners complain when they likewise were aware of his appraisal, and they likewise elected not to call him *under subpoena.*

THE EVIDENCE AND TRIAL

At trial of this case, Petitioners called a single expert witness on the issue of value. The witness was V. P. Ringer, who testified that in his opinion the highest and best use of the land was for *Apartment* use (Appendix p. 40). Ringer testified that in his opinion the market value of the land was $220,108.11, or $1.20 per square foot. (Appendix p. 35). Ringer's status as an expert and his qualification to express an opinion of the market value of the land *was not challenged.*

After Ringer had testified Respondents called a single expert value witness, H. F. Finley. Finley differed with Ringer as to the highest and best use of the land, and concluded that its highest and best use was for *residential purposes.* The record reveals that only a limited number of single family units could be placed on the land, and reveals the going price for homes on the surrounding land at the time. (Appendix p. 35). This information tends to support the lower Finley opinion in the same manner

that the suggestion of higher density development tends to support the higher Ringer opinion.

Finley's status as an expert and his qualification to express an opinion as to the value of the land was *unchallenged.* (Appendix p. 36).

After the evidence closed, the case was submitted to the jury, which returned a verdict of $155,960.00. (Appendix p. 28).

THE BEARDEN APPRAISAL, THE OFFER AND THE VERDICT

Applicable State law mandates that the Respondents could not condemn Petitioners' land without first seeking, *in good faith,* to purchase. *Lapsley v. State,* 405 S.W.2d 406 (Tex. Civ. App. 1966, ref. n.r.e.). It was in preparation for such a good faith effort that the Bearden appraisal was prepared. (Petition p. 7). The Bearden appraisal estimated the value of Petitioners' land at $146,800.00, and in the course of negotiations, Petitioners were *offered* and *refused* this full amount. (Petition p. A-4). Petitioners have never questioned the fact that Respondents—prior to condemnation—acted in good faith in the effort to secure the right of way and, in fact, Respondents based their offer on their *highest* appraisal. (Petition p. A-4).

As noted, the Verdict was $155,960.00, and the Judgment below mandates that Petitioners be paid the full amount of the Verdict (Appendix p. 30). Thus Petitioners are compensated in an amount of $9,160.00 over the Respondents' offer, and in this sense have "won" in the State Courts.

The essence of Petitioners complaint is that they did not win big enough. Thus, they seek a second trial.

ARGUMENTS AND AUTHORITIES

ARGUMENT I (In Answer to Petitioners' Questions 2 and 3), PUBLIC POLICY AND DUE PROCESS DO NOT REQUIRE A CONDEMNOR TO PRODUCE EVIDENCE OF ITS HIGHEST APPRAISAL, OR OF ITS FINAL OFFER BEFORE CONDEMNATION.

Under Texas law, Respondents were required to negotiate with Petitioners to purchase their land as a prerequisite to condemnation. Additionally, the State law required that the negotiations be conducted in good faith. *City of Teague v. Stiles*, 263 S.W.2d 623 (Tex. Civ. App. 1953 ref. n.r.e.), *Lapsley v. State*, 405 S.W.2d 406 (Tex. Civ. App. 1966, ref. n.r.e.).

The Respondents' good faith in negotiations has never been questioned. Indeed, Respondents offered Petitioners the highest of the two amounts reported in the two appraisals prepared for purposes of negotiation (Petition p. A-4).

Petitioners argue that in addition to the State requirement of good faith negotiation—as a prerequisite to the right to condemn—due process dictates that a Condemnor *must* submit evidence—in trial of a condemnation case—at least as high as the highest appraisal developed for purposes of negotiations, and/or as high as the highest offer made in the effort to negotiate a purchase prior to condemnation.

Sound public policy mitigates against such a rule. The State requirement of *good faith* negotiation prior to condemnation serves the ends of due process, and serves to minimize litigation. Good faith effort to purchase serves to assure that more land owners will receive offers they

can accept, and thereby relieve them of the cost, delay and burden of litigation.

The rule proposed by Petitioners—if held to be law—would serve to defeat this worthy goal. First, it may be readily recognized that when condemnors *must* negotiate in good faith, they will be *induced* to secure reasonable appraisals in preparation to negotiate. Reasonable appraisals will assure that land owners receive fair, or good faith offers. Only when such good faith efforts fail may the condemnor resort to forced purchase by exercise of the power to condemn.

Indeed, a condemnor, when required to make a good faith offer as a prerequisite to condemnation, will often be induced to make an offer somewhat more than what it considers to be its best estimate of market value. This is so because the cost and delays of litigation may offset reasonable additions in voluntary compensation necessary to secure an immediate voluntary purchase.

Petitioners' proposed rule would destroy the incentive of both condemnors and condemnees to act in good faith. Condemnees, knowing that the condemnors would have to produce evidence at trial, at least as high as the best offer, would be motivated to negotiate the best offer and then reject it. The condemnor would then be required to produce evidence on trial of the condemnation consistent with the rejected highest offer. Such evidence would tend to establish a level under which the compensation established in adjudication of value would seldom dip. Thus the condemnee would know that by forcing litigation, he could always get more than the best offer made in negotiations.

The condemnors, anticipating the effect of the rule, would contrive to mitigate its effect. Incentive would

exist to use appraisers of questionable ethics who would appraise consistently low. Negotiations by the condemnor would exist in form only and would consist of ceremonial offers calculated intentionally low to assure that compensation established in litigation would not exceed a reasonable cost.

The result would be that knowledgeable land owners would force condemnation in all cases, after negotiating the highest possible offer, while the less sophisticated land owners would be denied the benefit of a good faith offer based on a reasonable appraisal. It would be the unsophisticated owners unwilling or unable to "fight city hall" who would be victimized.

The public policy which supports the rule of evidence against the admissibility of offers to compromise mitigates equally against the rule urged by Petitioners.

Due process requires that substantial justice be done. *Simon v. Craft,* 182 U.S. 427, 21 S.Ct. 836. Its basic components are notice, hearing and a reasonable procedure, conducted reasonably, *Nebbia v. New York,* 291 U.S. 502, 54 S.Ct. 505; *La Costa v. Department of Conservation of Louisiana,* 263 U.S. 545, 44 S.Ct. 186.

In this case, Petitioners were afforded due process of law. First, they were offered a sum equal to the Respondents' *highest* appraisal. Being dissatisfied, they rejected the offer. Second, they were afforded hearing before three disinterested freeholders acting as Special Commissioners. (Appendix p. 15). At hearing before the Special Commissioners, Respondents produced the testimony of their highest appraiser. The Special Commisisoners awarded Petitioners a sum of money which they withdrew on May 10, 1959 (Appendix p. . .). They have had the use of this money since. Being dissatisfied with the sum

awarded by the Special Commissioners, Petitioners appealed to the Trial Court. Third, after waiting thirteen years, Petitioners brought their claim against Respondents to trial. Because of this long delay, Respondents might have disposed of the matter without trial. *Denton County v. Brammer,* Tex. Sup. 361 S.W.2d 198 (1962). However, no such effort to avoid trial was made by Respondents, and Petitioners received a trial before a Court and Jury. In preparation for trial, Respondents sought the services of their *highest* appraiser to again testify, but found that due to Petitioners' long delay, he was no longer willingly "available." At trial—which lasted four days (Appendix p. 30)—over 500 pages of appraisal testimony was developed on the question of the value of Petitioners' land. After hearing the evidence, a Jury returned a verdict which exceeded Respondents' highest appraisal by $9,160.00.

Petitioners' only complaint is that Respondents did not subpoena the "unavailable" highest appraiser. Yet Petitioners were fully aware of his appraisal, and could have subpoenaed him to trial had they seen fit to do so. *State v. Biggers,* Tex. Sup. 360 S.W.2d 516 (1962).

Clearly, Petitioners were afforded due process of law.

ARGUMENT II (In Answer to Petitioners' Question 1), THERE WAS NO SUPPRESSION OF EVIDENCE IN THE TRIAL OF THIS CASE.

As noted above in the statement of the case, the evidence in this matter is undisputed that Respondents sought to use Bearden as an expert value witness even though his appraisal was considerably higher than that of Finley. Additionally, it has been noted that in preparation for trial of this case, Finley was the only appraiser found who

was willing to serve as an expert witness. This too is undisputed. While there was an appraisal lower than Bearden and higher than Finley, by one Winstead, its existence was unknown to Respondents' counsel until hearing on the motion for new trial. The record is therefore silent on whether Winstead would have been "available to testify."

The important point is that Respondents stood willing to use their highest available appraiser at trial, had he been available to assist in trial preparation, and to testify. In fact he was not. Had Petitioners not delayed for thirteen years before bringing the case to trial, he might have been "available."

Additionally, Petitioners were fully aware of Respondents' highest appraiser and they, like Respondents, could have compelled his testimony by subpoena. This they elected not to do. Thus there was no suppression of evidence.

Petitioners, in their argument that Respondents suppressed evidence, rely on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763.

An examination of *Brady* and *Giglio* reveal that each case is clearly distinguishable. In *Brady*, a criminal case, Defendant's counsel *requested* that the prosecution allow him to examine extrajudicial statements by the Defendant's Co-Principal to the crime of murder. A statement by the Co-Principal was withheld. This Court held that when the prosecution suppresses evidence favorable to the accused *upon request*, such suppression violates due process.

In this case, Petitioners did not *request* a disclosure of Respondents' evidence. Additionally, they were aware of the evidence they allege to have been suppressed, and elected not to make use of it. Thus the cases are not alike.

In *Giglio,* also a criminal case, the Defendant's unindicted Co-Conspirator testified that he had *not* been offered immunity to testify when, in fact, *immunity had been promised.* Thus evidence was not only suppressed, but the government condoned perjury to affect the suppression. Here again the cases are not alike. No agent of Respondents sought to conceal evidence from Petitioners, much less condone or suborne perjury to accomplish the concealment.

In this case, Respondents used that evidence known to counsel, that was still available after Petitioners delayed trial for an excessively long period of time.

Such does not support a conclusion that evidence was suppressed.

CONCLUSIONS

Petitioners urge a rule which would compel a condemnor to provide evidence at trial at least as high as its highest offer and/or its highest appraisal. Such a rule would serve to discourage good faith negotiating between potential condemnors and condemnees. Thus the rule would defeat rather than promote the legitimate ends of due process, and would cause rather than avoid litigation.

Due process requires that Petitioners be afforded notice, hearing and a reasonable procedure. Petitioners had notice and were afforded two hearings including full trial before a jury. In the process, they profited by a verdict of $9,-160.00 over the Condemnor's highest appraisal.

Their only complaint is failure of Respondents to subpoena an unwilling expert witness about whom they were fully aware, and who they could have called. Thus no evidence was suppressed, and Petitioners were fully afforded due process of law.

For all of these reasons, Petitioners' Application for Writ of Certiorari to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas should be denied.

Respectfully submitted,

JOE RESWEBER
County Attorney
Harris County, Texas

EDWARD J. LANDRY
Senior Assistant County Attorney

By _____
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CERTIFICATE OF SERVICE

I, CHARLES J. WILSON, Assistant County Attorney, and Attorney of Record for Respondent, State of Texas, and the County of Harris, in the above cause, hereby certify that on this day I mailed three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Robert L. Burns, of the firm of Sears and Burns, Attorneys at Law, Suite 823, Two Houston Center, Houston, Texas 77002, with sufficient postage to assure delivery. I further certify that all persons entitled to Notice have been notified.

DATED this 14 day of August, 1974.

_____
CHARLES J. WILSON

APPENDIX

1. Respondents' Original Petition in the Trial Court.

NO. 93,317

IN THE
COUNTY COURT AT LAW
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS et al.

vs.

W. KENNETH POPE et al.

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME your petitioners, the State of Texas, and the County of Harris, a body corporate and politic under the Laws of the State of Texas, having by law the right of eminent domain and power of condemnation, acting herein by and through its duly elected and qualified Commissioners Court, for and on behalf of the State of Texas, at the request of the State Highway Commission of the State of Texas, hereinafter styled Plaintiffs, complaining herein of:

> W. KENNETH POPE and wife, KATIE S. POPE; CITY OF HOUSTON; HOUSTON INDEPENDENT SCHOOL DISTRICT; and CARL S. SMITH, Harris County Tax Assessor and Collector,

hereinafter styled Defendants, whether one or more, and for cause of action respectfully represent to the Court as follows:

I.

The State Highway Commission of the State of Texas has laid out and determined that there exists a necessity for, and has requested the Commissioners Court of Harris County, Texas, to acquire by condemnation or otherwise the hereinafter described land for State Highway purposes; the plans and specifications for the right of way and construction of said Highway have been furnished to the Commissioners Court of Harris County, Texas; and it has been authorized and directed to acquire, by condemnation or otherwise, the said right of way for such purpose; and the said Highway Commission has, in the exercise of the powers and duties conferred upon it, determined that there exists a necessity for such Highway; and that the right of way sought herein is likewise necessary and convenient for the course of said State Highway; that said Highway, when constructed, will become an integral part of the State Highway System of the State of Texas, being State Highway No. U. S. 59, County Road No. 17830-2, also known as Southwest Freeway; which right of way herein sought to be condemned forms a part of a tract of land owned by the Defendants in Harris County, Texas, more particularly described as follows:

[Field Notes Omitted]

II.

Plaintiffs are acting under and by virtue of the authority of Articles 3264 to 3271, inclusive, and Article 6674n of the Revised Civil Statutes of the State of Texas, 1925, the consent of the governing body of the City of Houston having been obtained as provided in said Article 6674n.

III.

Plaintiff Harris County and Defendant have been unable to agree upon the sum to be paid for the purchase of said tract of land.

IV.

Plaintiffs are informed and believe, and so allege, that the Defendants hereinbefore named are the record owners of said property; or are holding or claiming some interest in or title to said property; and if Plaintiffs are in error as to the ownership of said property, or as to the extent of title or interest of the hereinbefore named Defendants in and to the property hereinbefore described, Plaintiffs reserve the right to add the name or names of such additional owner or owners, or claimant or claimants, whose interest may subsequently appear; and to condemn the interest of each of such other parties as may subsequently appear, in order to acquire the title in this proceeding for public road purposes, as provided by law.

V.

The State Highway Commission of the State of Texas having heretofore declared the necessity and public convenience by its order to acquire such land for the purpose aforesaid, the Commissioners Court of Harris County, Texas passed orders declaring such fact, and authorizing and directing the filing of this condemnation suit by the undersigned County Attorney of the County of Harris, for and in behalf of the State Highway Commission of the State of Texas.

WHEREFORE, premises considered, Plaintiffs pray that Special Commissioners be appointed as required by

law; that the Special Commissioners so appointed set a date for the hearing; that Defendants be notified of the date of such hearing; that at said hearing, the Special Commissioners assess the value of the property and land belonging to the Defendants which is sought to be condemned, and assess damages, if there be any, that would be occasioned to the remainder of the Defendants' land by acquisition and use, as aforesaid; that Plaintiffs have a decree of condemnation vesting all right, title and interest of the Defendants in and to the property hereinbefore described in the State of Texas for right-of-way purposes for a State Highway, public road, superhighway and freeway; and that upon payment into the Registry of the Court of the amount awarded the Defendants by the Special Commissioners herein appointed, the Plaintiffs have a writ of possession issued in their behalf; all as provided by law; for costs of court; and for such other and further relief, both general and special, as Plaintiffs may be entitled to receive.

/s/ JOE RESWEBER
Joe Resweber
County Attorney
Harris County, Texas

/s/ W. R. ELLIS
W. R. Ellis
Assistant County Attorney
Harris County, Texas

NO. 93,317

IN THE COUNTY COURT AT LAW
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS et al, Plaintiffs

vs.

W. KENNETH POPE et al, Defendants

PLAINTIFFS' ORIGINAL PETITION

Filed on January 13th 1959
at 9:05 A.M.

/s/ MADISON RAYBURN
Judge

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2. Preliminary Award of Special Commissioners.

NO. 93,317

IN THE
COUNTY COURT AT LAW
OF HARRIS COUNTY TEXAS

THE STATE OF TEXAS et al.
COUNTY OF HARRIS, Plaintiff

vs.

W. KENNETH POPE et al., Defendant

AWARD OF COMMISSIONERS

On this, the 30th day of January, 1959, came on to be considered the above matter, before the undersigned,

CLAXTON PARKS, RUSSELL L. MILLER and JOHN V. SINGLETON,

Special Commissioners and freeholders of Harris County, Texas, duly appointed by the Honorable Judge of the County Court at Law of Harris County, Texas, upon the application of the County of Harris, a body corporate and politic, said petition for condemnation having been filed on the 13th day of January, 1959, in the County Court at Law of Harris County, Texas, praying for the condemnation of a certain strip of land required for a right of way over the lands and premises of

W. KENNETH POPE and wife, KATIE S. POPE; CITY OF HOUSTON; HOUSTON INDEPENDENT SCHOOL DISTRICT; and CARL S. SMITH, Harris County Tax Assessor and Collector;

said right of way for which application to condemn was filed being for the purposes of opening, widening, draining, and grading and constructing a portion of State Highway No. U. S. 59, Southwest Freeway, County Road No. 17830-2, in the County of Harris and State of Texas; said land being condemned being more particularly described as follows:

[Field Notes Omitted]

The said Commissioners having given notice, and the said Defendants having been duly and properly served with notice of the time of hearing and the place of meeting, all as required by law; and all parties having appeared in person or by their attorneys, and having announced ready for trial, all matters involved in said condemnation were submitted to the said Special Commissioners; and at the appointed time and place, the pleadings and evidence of all of the parties as to the value of the land taken for right of way purposes, and as to the damages, if there be any, which will be sustained by the Defendants by reason of such condemnation, having been heard by the said Special Commissioners, we find as follows:

For the value of the land taken, the same being hereinbefore more particularly described, at the time of said hearing, the sum of One Hundred Sixty-five Thousand, One Hundred Thirty-four and 70/100 Dollars ($165,-134.70); and we find no damages to the balance of the Defendants' property by reason of such condemnation and taking, being a total sum of One Hundred Sixty-five Thousand, One Hundred Thirty-four and 70/100 Dollars ($165,134.70), awarded herein.

And we, the said Special Commissioners, award the hereinbefore described land and the title thereto to the State of Texas, for right of way purposes, with full and complete right, use and possession thereof; and we hereby adjudge all costs of this proceeding against the Plaintiff.

/s/ CLAXTON PARKS

/s/ JOHN V. SINGLETON

/s/ RUSSELL L. MILLER

3. Petitioners' Objection to the Award of the Special Commissioners.

NO. 93,317

IN THE
COUNTY COURT AT LAW
OF HARRIS COUNTY, TEXAS

STATE OF TEXAS, ET AL

vs.

W. KENNETH POPE, ET AL

OBJECTIONS OF DEFENDANTS
W. KENNETH POPE, ET AL

To The Honorable Judge of Said Court:

The Defendants, W. Kenneth Pope and wife, Katie S. Pope, file these Objections to the Award of the Commissioners:

I

The Award of the Commissioners is grossly insufficient and does not award these Defendants just compensation for their property in that the amount of such award is grossly less than the market value of such property.

II

There is no jurisdiction of the parties of the subject matter as affirmatively appears from the Statement in

Condemnation filed by the State of Texas and the County of Harris, because neither the State of Texas nor the County of Harris has taken the action prescribed by law necessary to authorize Condemnation of the Defendants' property.

III

The Statement in Condemnation filed by the State of Texas and County of Harris affirmatively shows that the petitioners are seeking to acquire a greater interest in the property described than permitted by law in that it does not expressly exclude from the Estate sought to be condemned all the oil, gas and sulphur which can be removed from beneath the land as required by law.

IV

As affirmatively appears from the Statement in Condemnation filed by the State of Texas and the County of Harris, petitioners seek to condemn the land for a "controlled access highway" and have not complied with the mandatory prerequisites prescribed by law to authorize and initiate condemnation proceedings for such purpose, and the action is not brought by a person authorized by law to prosecute the proceedings.

V

Defendants reserve the right to raise any further objections upon the trial hereof, and reserve the right to amend these objections.

WHEREFORE, these Defendants pray that this proceeding be dismissed, and in the alternative, that they

be awarded the market value of the land proposed to be taken, and in any event for all relief for which they may show themselves entitled at law or in equity together with all costs of suit.

HOFHEINZ, SEARS, JAMES
AND BURNS

By ROBERT L. BURNS
Robert L. Burns
1107 South Coast Bldg.
Houston 2, Texas
Attorneys for Defendants
W. Kenneth Pope and wife,
Katie S. Pope

4. Judgment of the Trial Court.

NO. 93,317

IN THE
COUNTY CIVIL COURT AT LAW NO. 1
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS, ET AL, Plaintiffs

vs.

W. KENNETH POPE, ET AL, Defendants

JUDGMENT ON VERDICT

BE IT REMEMBERED that on the 20th day of March, 1972, came on to be heard the above entitled and numbered cause wherein the State of Texas and the County of Harris are Plaintiffs; W. Kenneth Pope, his wife, Katie Pope, Carl Smith, Tax Assessor & Collector of Harris County, Texas; The City of Houston and the Houston Independent School District are Defendants; and wherein Eliza T. Johnson is Intervenor. Be it further remembered that this cause is an action in eminent domain for the condemnation of the land hereinafter described; that Plaintiff has heretofore on March 6, 1959 deposited the amount of the Award of the Special Commissioners in the Registry of the Court, which amount, save and except for $781.26, was withdrawn from the Court Registry by W. Kenneth Pope et ux, the said sum of $781.26 having been left in the Registry of the Court to secure the claim of the City of Houston and Houston Independent School District for taxes. That because Defendants withdrew the Award of the Commissioners from the Registry of the Court before the commencement of

trial, the only issue before the Court on trial hereof was the issue of the market value of the land condemned, and the issue of whether or not, and to what extent the Defendants' remaining land was damaged. Be it further remembered that in open Court and before commencement of trial, Defendants W. Kenneth Pope et ux admitted that they suffered no damage to their remaining land, for which reason the only remaining issue before the Court was the issue of the market value of the land condemned. Further, be it remembered that the parties stipulated in open Court that the date on which Plaintiffs deposited the amount of the Commissioners Award was March 6, 1959, and therefore the only issue to be tried was the market value of the land condemned on March 6, 1959.

The parties plaintiff and defendant having appeared in open Court and announced ready for trial, and the parties plaintiff and defendant having submitted to the Court evidence in the form of certified copies of Judgments in the District Court that Intervenor Eliza T. Johnson has no interest in this cause, the Court directed that the trial should proceed.

And came a Jury of six good and lawful men and women, being duly impaneled and sworn, and the Jury having heard opening statements by counsel for the parties and the evidence for both plaintiffs and defendants, the matter was submitted to the Jury in connection with the charge of the Court on Special Issues on March 24, 1972, as follows:

"SPECIAL ISSUE NO. 1

"From a preponderance of the evidence, what do you find was the Market Value on March 6, 1959

on the 183,483 square feet of land belonging to W. Kenneth and Kate Pope and condemned by the State of Texas and County of Harris?

"Answer in dollars and cents."

And the Jury having heard the arguments of counsel and having retired to consider its verdict, after due deliberation, on the 24th day of March, 1972, return into open court its verdict and answers, to-wit:

"ANSWER: $155,960.00.

"We the Jury, have answered the above and foregoing Special Issue as herein indicated and herewith return same into Court as our verdict.

/S/ WAYNE K. GEIVER, FOREMAN."

And Eliza T. Johnson having intervened herein, claiming title to the subject land and the proceeds of condemnation for the said land adverse to Defendants W. Kenneth Pope and wife, Katie Pope, and the 80th District Court of Harris County, Texas, in Cause No. 576,461, having adjudicated title to the land in question to be in W. Kenneth Pope and wife, Katie Pope, as against certain persons claiming under Eliza T. Johnson, and the 151st District Court of Harris County, Texas, in Cause No. 668,238, having further adjudicated title to the subject land to be in W. Kenneth Pope and wife, Katie Pope, as against other persons claiming under Eliza T. Johnson, and the Court finding that the 80th District Court and the 151st District Courts are courts of competent jurisdiction to adjudicate title to real property, located in Harris County, Texas, and the property made the subject of this cause being located in Harris County, Texas, the Court is of the opinion that Eliza T. Johnson has no interest

in the subject property or in the proceeds of this action in eminent domain, and the Intervenor Eliza T. Johnson should be dismissed from this action, and that her pleading in intervention should be stricken from this proceeding.

And Carl S. Smith, in his capacity as Tax Assessor and Collector of Harris County, Texas, having intervened in this matter for taxes due the State of Texas and the County of Harris, which taxes have since been paid, he should be dismissed from this cause and take nothing by this Judgment.

And the City of Houston and Houston Independent School District having heretofore intervened in this cause for taxes, which taxes have been paid, the said City and School District should be dismissed from this cause, and they should take nothing by this Judgment.

And said verdict and answer of the Jury having been received in open court, and having been filed, and the jury having been discharged, and the Court being of the opinion that under the evidence and under the answers of the Jury to the Special Issue above set out, Plaintiff, State of Texas, is entitled to a Judgment for title to the hereinafter described land; and the Court being further of the opinion that Defendants, W. Kenneth Pope and wife, Katie Pope, are entitled to recover from Plaintiffs, as compensation for the taking of the said land, the value of said land, being the sum of ONE HUNDRED FIFTY-FIVE THOUSAND NINE HUNDRED SIXTY DOLLARS ($155,960.00), in full and complete settlement, satisfaction and discharge of the liability of Plaintiffs to said Defendants by reason of this condemnation and taking of the land hereinafter described, and the said Defendants owning the remainder of said land, consisting

of two acres, more or less, to the south of the land condemned, for which no damages have been claimed, the Court is of the opinion that said Defendants should recover no additional sum as damages to their remaining land, and that the total sum to which Defendants are entitled as compensation for the condemnation of their land and its severance from their remaining land is the sum of ONE HUNDRED FIFTY-FIVE THOUSAND NINE HUNDRED SIXTY DOLLARS ($155,960.00), the market value of the land condemned;

And the Court further finding, as reflected by the papers on file herein, that on January 30, 1959, the Special Commissioners heretofore appointed by the Court awarded Defendants the sum of One Hundred Sixty-Five Thousand One Hundred Thirty-Four and 70/100 Dollars ($165,134.70) as compensation for the land taken, which amount was contested and objected to by Defendants, and that further, on May 10, 1959, Defendants W. Kenneth Pope and wife, Katie Pope, withdrew from the Registry of the Court the sum of One Hundred Sixty-Four Thousand Three Hundred Fifty-Three and 44/100 Dollars ($164,353.44), leaving in the Registry of the Court the sum of $781.26 to secure the claim for taxes by the City of Houston and the Houston Independent School District, which sum of $781.26 remains and is still in the Registry of the Court.

And the sum of $165,134.70, awarded by the Special Commissioners exceeds the amount due the Defendants in the amount of $9,174.70, which amount Plaintiff, County of Harris, is entitled to recover. And the Court further finding that the sum of $781.26 was left in the Registry of the Court as security for the payment of taxes due and owing to the City of Houston and the

Houston Independent School District, which taxes have since been paid, the Court is of the opinion that the Plaintiff, County of Harris, is entitled to recover from the Registry of the Court the sum of $781.26. Upon recovering the sum of $781.26 from the Registry of the Court, the Court finds that Plaintiff, County of Harris, is entitled to recover over and against Defendants, W. Kenneth Pope and wife, Katie Pope, the further and additional sum of Eight Thousand Three Hundred Ninety-Three and 44/100 Dollars ($8,393.44) with interest at the legal rate from the date of Judgment.

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiff State of Texas do have and recover of and from the Defendants, W. Kenneth Pope and wife, Katie Pope, all right, title and interest in and to the following described land, to-wit:

[Field Notes Omitted]

It is further ORDERED, ADJUDGED AND DECREED that Plaintiff County of Harris have Judgment over and against Defendants, W. Kenneth Pope and wife, Katie Pope, in the amount of EIGHT THOUSAND THREE HUNDRED NINETY-THREE AND 44/100 DOLLARS ($8,393.44), with interest at the legal rate of 6% from the date of this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that the Intervention of Eliza T. Johnson on file herein be, and it is, stricken from the pleadings of this cause, and it is ORDERED that Eliza T. Johnson and those claiming under her take nothing by this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that Defendant Carl S. Smith, Tax Assessor and Collector in and for Harris County and the State of Texas, is dismissed from this cause, and it is ORDERED that he take nothing by this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that the City of Houston and the Houston Independent School District are dismissed from this cause, and it is ORDERED that they take nothing by this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that the Clerk be, and he is Ordered to pay over to the County of Harris the sum of $781.26, on deposit in the Registry of this Court in this cause, upon the filing of proper receipt.

It is further ORDERED that all cost accrued herein from the time of filing of Defendants' objections herein be, and it is, assessed against the Defendants.

For all of which let execution issue.

ENTERED this 7th day of December, 1972.

/s/ CHARLES C. CASTLES
Judge Presiding

APPROVED:

JOE RESWEBER, County Attorney

By /s/ CHARLES J. WILSON
Charles J. Wilson
Assistant County Attorney

5. Excerpts from "Preliminary Fact Statement" in "Respondents' Answer to Petitioners' Application for Writ of Error" filed in the Supreme Court of Texas.

PRELIMINARY FACT STATEMENT

The facts as related by the Court of Civil Appeals are substantially correct with two exceptions.

First, the opinion explains that the long delay between Petitioners filing objections (February 17, 1959, TR Pp 8-12) and Petitioners bringing the case to trial (March 20, 1972, TR Pp. 37-42) was due to a protracted trial in a Trespass to Try Title. The record on appeal does reflect—in the Trial Court's Judgment—that actions in Trespass to Try Title were involved. However, the record on appeal is silent as to when Trespass to Try Title commenced and ended. During oral argument before the Court of Civil Appeals, Petitioners did represent that delay had been caused by the trespass action, and Petitioners so represent in the Application for Writ of Error, (AWE p. 16). However, when Petitioners requested transcript (TR Pp. 85-86) they did not include in the request any documents which would reflect when the trespass action commenced and ended. The second page of the Trial Court's Judgment (TR Pp. 27-42) reveals that certified copies of the Trespass Judgments were before the Trial Court, and Petitioners could have had these instruments in the record on appeal had they so desired.

Information within the record about the trespass action reveals (1) that Eliza T. Johnson claimed the land adverse to Petitioners and sued Petitioners in Trespass to Try Title. (2) That Eliza T. Johnson was the *only* adverse claimant to intervene in this condemnation action.

(3) That two Judgments, in two trespass actions were entered against persons claiming under Eliza T. Johnson. (4) That, based on the Trespass Judgments, the Trial Court dismissed Eliza T. Johnson as an Intervenor and struck her Petition in Intervention.

It is submitted that since the record is silent as to when the Trespass actions were filed, and as to when they were terminated, it was improper for the Court of Civil Appeals to assume that a thirteen year delay in trial was justified by the Trespass actions.

Additionally, it is submitted that since Eliza T. Johnson was the *only* adverse claimant to intervene in this condemnation, and since other adverse claimants claimed under her, Petitioners were free to proceed to trial when the trespass action by Eliza T. Johnson was adjudicated against her.

Fortunately, there is a means by which this Court can determine the date of termination of the Trespass action by Eliza T. Johnson. *H. H. Farnhart v. W. Kenneth Pope, et ux,* 384 S.W.2d 932 (Tex. Civ. App., 1964), is the Trespass to Try Title—suit filed by Eliza T. Johnson. From this reported opinion it is seen that Eliza Johnson was Plaintiff. During pendency of litigation, Eliza Johnson died and Farnhart, claiming under her as Grantee, was substituted as Plaintiff. In the reported opinion it is revealed that *Eliza Johnson* sued Respondents on August 2, 1961, to recover *six acres out of 42.492 acres in the A. C. Reynolds League, Harris County, Texas.* This action *condemns 4.2122 acres out of two three acre tracts (six acres) in the A. C. Reynolds Survey, Harris County, Texas.* The reported opinion reveals that Plaintiff lost at trial, appealed and trial Court was affirmed. Judgment of

the Court of Civil Appeals was rendered on November 19, 1964, and rehearing was denied on December 10, 1964. Thus this Court may take judicial notice of the opinion in *Farnhart v. Pope*, and see that the long delay in trial of this case was not due to a protracted trial of a Trespass to Try Title.

* * *

As their first and only witness, Petitioners called a real estate appraiser named V. P. Ringer (TSF Pp. 4-262). Ringer testified to personal qualifications sufficient to allow him to express an opinion of real estate value (TSF pp. 4-22). Respondents lodged no objection to Ringer's opinion testimony and Ringer expressed an opinion that the land was worth $220,108.11, or $1.20 per square foot (TSF p. 23).

* * *

After Petitioners rested, Respondents called one value witness, H. F. Finley. Finley testified to facts about his background that would establish that he was qualified to express an opinion as an expert on value of real estate (TSF pp. 280-289). In this regard he testified that he had been in the real estate business since 1947 (TSF p. 280), starting as a broker, later working as a builder (TSF p. 281), but without giving up the brokerage business. In 1952-1953 he became more active as an appraiser (TSF p. 284). He testified that as a broker he has sold all kinds of real estate (TSF p. 285), that he is a member of the American Society of Appraisers (TSF p. 286) and is past president of the Houston Chapter (TSF p. 288).

Finley testified that he was familiar with the subject property, as it was in 1959, before condemnation, and that he had appraised it for the Harris County Right of

Way Department (TSF pp. 289-290). *Petitioners did not object to Finley's qualifications as an expert,* and Finley testified that in his opinion the highest and best use of the subject property at the time of condemnation in light of surrounding conditions, *would have been residential.* Finley's opinion that the land was best suited for residential use explains his opinion that the land had a relatively low value ($75,000.00) in relation to Ringer and to other appraisers the State might use. By referring to any of the four aerial photographs in the record, it can be seen that the land was surrounded by residential subdivisions. Ringer had testified that the average price of houses on adjoining property ranged from $14,000.00 to $19,000.00 (TSF p. 37). To develop the land residentially, a street would have to be extended through the middle of the property. If lots were then laid out, of the same size as adjacent residential lots, approximately 20 lots could be provided. In view of a $14,000-$19,000 range for finished houses, a price of $75,000.00 for vacant land out of which a street would have to be provided, and out of which approximately 20 lots could be surveyed, does not seem outrageous.

Finley testified that by use of the "market approach" he formed an opinion of the value of the subject property, and that in his opinion it had a value of $75,000.00, or $17,500.00 per acre or $.40 per square foot on March 6, 1959, the date of taking. (TSF p. 329).

6. Excerpt from Testimony of Charles J. Wilson, Respondents' Counsel, at Motion for New Trial.

MR. WILSON: I'll try to keep it brief and informal for the record. My name is Charles J. Wilson, and I'm an assistant county attorney in the Harris County Attorney's office and I have been with the county attorney since September of 1962. I have been assigned from time to time to emminent domain cases since about 1966 when Joe Terracina left the county attorney's office and numerous cases were reassigned from him to me and at that time I became or started to become familiar with the activity in the trial of emminent domain cases.

In the latter part of 1970, Mr. Charles F. Mitchell, who had been with the county attorney's office for a number of years, announced his retirement and retired during the first of November of 1970. At that time, he was assigned to the case, State of Texas, Vs. W. Kenneth Pope and at that time Mr. Burns, representing the defendant, had the case set for trial and at that time numerous of Mr. Mitchell's files were reassigned to me and one of these cases was the Pope case which was reassigned to me. I immediately upon receiving this file, Your Honor, I reviewed the file that was available to me in the office of the county attorney and I found there had been in the file one appraisal of what we refer to in the business as "base appraisal." By "base appraisal" which is a term we use, we refer to an appraisal and on a given case as many as there may be several but a "base appraisal" is an appraisal prepared prior to the initiation of the condemnation and which was used as a basis of making the offer which was then related to, transmitted to, the county attorney by the right-of-way depart-

ment with a request that we proceed in condemnation and it will be the appraisal used at the commissioners hearing under the procedure as follows in our office.

This appraisal was by Mr. Thomas Bearden and a copy of the letter in the record need not be further elaborated on. There were various orders of commissioners court indicating several other appraisals had been requested to appraise the property and letters indicating that various of these appraisers had not followed through and had for reasons otherwise not turned in the appraisal reports. There was a letter in the file from Mr. Finley indicating that he had appraised the property and setting out his opinion of value. On December the 21st, 1970 I made a call to Mr. Bearden because his seemed to be the only available appraisal and I knew the case was going to have to be tried. I customarily make a written, hand written, memorandum when I talk to somebody on the telephone about important matters on one of these files on the phone and I made such memorandum of my telephone conversation with Mr. Bearden which was dated December the 21st, 1970. Reading from this memorandum dated on that day and written by me on that date I read.

MR. BURNS: I object to anything Mr. Bearden had to say being hearsay. I can't cross examine him and let him without objection testify to this which was indicated by the file as to commissioners mentioned. I do object to this.

THE COURT: All right, sustained at this time as to hearsay.

MR. WILSON: Your Honor, I would offer an explanation as to what—I'll say this much, I found that Mr.

Bearden was not available to testify. Do you want to go into why?

MR. BURNS: I object because this is the conclusion of the witness, Your Honor.

THE COURT: Well, you can take him on cross examination. I'll overrule the objection to testimony that Mr. Bearden was not available to testify subject to your cross examination.

MR. WILSON: Okay. Finding Mr. Bearden was unavailable, I talked to Mr. Finley and Mr. Finley advised me he had completed an appraisal and he had data in his office later when the case was again at the time set for trial, I reviewed the matter with Mr. Finley and he made available the data on which he based his testimony. At that time, he was the only appraiser that I could find available who'd claimed to have appraised the property and who had anything to do with the appraisal back in 1958 about the time of taking. Mr. Finley, was hired by commissioners court on February the 26th, 1959, Your Honor. That's my offer of the explanation as to why Bearden's appraisal was not used in the trial . . ."

* * *

7. Excerpt from the Testimony of V. P. Ringer at trial. Questions by Mr. Burns.

* * *

Q. Mr. Ringer, do you have an opinion as to what was the highest and best use of this property on March the 6th, 1959?

A. My opinion that the highest and best use would be to develop it in multi-unit apartments.

* * *